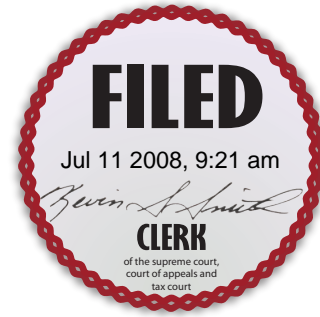


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER MILLER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0712-CR-718

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Melissa Kramer, Commissioner
Cause No. 49G17-0705-CM-90743

July 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Christopher Miller appeals his conviction for Battery, as a Class A misdemeanor,¹ claiming that there was insufficient evidence to find him guilty beyond a reasonable doubt as he asserts the defense of necessity. On March 29, 2007, Miller's sister ("Sister") called for his help because she was involved in a physical altercation with Darrell Sanders, the father of her child. When Miller came out of his apartment, he confronted Sanders by asking him "What's up?" As the men were exchanging words, Sister retrieved a handgun from her apartment and pointed it at Sanders when she returned. She pulled the trigger, but nothing happened. Sanders turned to leave. As he did so, Sister, still holding the gun, tried to kick him so he grabbed her leg. Sister pointed the gun and continuously pulled the trigger despite it not working. Miller demanded Sanders let go, but Sanders kept his hold. Then Miller struck Sanders twice in the head with a closed fist. Sanders let go. Then the two men wrestled and eventually fell through a screen door.

At the bench trial, Miller asserted the defense of defense of others, specifically his sister. The trial court found Miller guilty as charged and sentenced him to time served.²

On appeal, Miller only raises one argument of whether he was erroneously convicted due to his actions being ones of necessity. He claims that based on the necessity of his actions that there is insufficient evidence to find him guilty beyond a reasonable doubt. Miller did not raise the defense of necessity to the trial court. While it is true that a sufficiency of the evidence issue can be first raised on direct appeal, the same is not true of a defense theory. Fields v. State, 179 Ind. App. 194, 197, 384 N.E.2d 1127, 1129 (1979).

¹ Ind. Code § 35-42-2-1(a)(1) (2007).

Therefore, Miller has waived the issue of a defense of necessity. Id. As he raises no other issues, we affirm his conviction.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.

² The sentence was for twelve days, and the trial court credited Miller six days plus credit time.